

No. 22-13315-X

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

**CONSUMERS' RESEARCH, CAUSE BASED COMMERCE, INC.,
EDWARD J. BLUM, KERSTEN CONWAY, SUZANNE BETTAC,
ET AL.,**

Petitioners,

v.

**FEDERAL COMMUNICATIONS COMMISSION, UNITED
STATES OF AMERICA,**

Respondents.

Petition for Review of an Order of the
Federal Communications Commission
Agency No. 96-45

RESPONSE TO SUPPLEMENTAL AUTHORITIES

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**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, Eleventh Circuit Rules 26.1-1 through 26.1-3, Petitioners provide this Certificate of Interested Persons and Corporate Disclosure Statement. To the best of Petitioners' knowledge, the following persons and entities may have an interest in the outcome of this case:

Baller, James
Barthold, Corbin
Bayly, Joseph
Beelaert, Jeffrey S.
Benton Institute for Broadband & Society.
Berry, Jonathan
Bettac, Suzanne
Blum, Edward J.
Boyden Gray & Associates
Buschbacher, Michael
Carr, James M.
Cause Based Commerce, Inc.
Center for Media Justice (d/b/a MediaJustice).
Chessen, Rick C.
Competitive Carriers Association.
Competitive Enterprise Institute
Consumers' Research
Conway, Kersten
Crews, Adam G.
DeMuth, Christopher C.
Deutsch, Elizabeth B.
Feder, Samuel L.
Federal Communications Commission
Free State Foundation
Frieden, Robert
Furchtgott-Roth, Harold
Gibbs, Lynn
Gibbs, Paul
Goldberg, Neal M.

Goodheart, Rebekah P.
Gotting, Eric P.
Gray, C. Boyden
Greve, Michael S.
Hellman, Matthew S.
HWG LLP
Jenner & Block LLP
Keller and Heckman LLP
Kelson, Jared M.
Kirby, Kwang Ja
Kirby, Tom
Kull, Robert
Langlinais, Jonathan A.
Lewis, Jacob M.
May, Randolph J.
McCotter, R. Trent
Morris, Steven F.
Murray, Brian W.
National Digital Inclusion Alliance.
National Telecommunications Cooperative Association (d/b/a NTCA –
The Rural Broadband Association).
NCTA, The Internet & Television Association
Neal, Jason
Roth, Deanna
Roth, Jeremy
Schools, Health & Libraries Broadband Coalition.
Schwartzmann, Andrew Jay
Sinzdak, Gerard J.
Stein Mitchell Beato & Missner, LLP
Stern, Mark B.
Tatel, Jennifer
TechFreedom
Thomas, Rhonda
United States of America
USTelecom – The Broadband Association.
Wilkinson, Barker & Knauer LLP

To the best of Petitioners' knowledge, no other persons, associations of persons, firms, partnerships, or corporations have an interest in the outcome of this case or appeal.

/s/ R. Trent McCotter

R. Trent McCotter

Counsel of Record for Petitioners

June 29, 2023

Honorable David J. Smith
Clerk of the Court
U.S. Court of Appeals for the Eleventh Circuit

Re: Response to Respondents' Rule 28(j) Letter in *Consumers' Research et al. v. FCC et al.*, No. 22-13315-X

Dear Mr. Smith:

On June 29, Respondents filed a Rule 28(j) letter arguing that a recent FCC Office of Managing Director order demonstrates that the FCC maintains “active oversight” of private company USAC’s actions. *See* ECF No. 75.

That argument is unpersuasive for several reasons.

First, the order merely makes a ministerial adjustment to USAC’s calculations to reflect a carryover of unspent funds. Consistent with its prior practice, the FCC is not “independently perform[ing] its reviewing, analytical and judgmental function,” and it certainly is not “participat[ing] actively and significantly in the preparation and drafting process” of the private company USAC’s quarterly contribution factor calculations. *Sierra Club v. Lynn*, 502 F.2d 43, 59 (5th Cir. 1974); Reply.Br.48.

Second, the order that Respondents cite was not even issued or directly approved by the FCC Commissioners themselves. The FCC used its unique “deemed approved” mechanism to adopt the order without the Commissioners ever lifting a finger, as occurs with every quarterly contribution factor. There remains a total absence of evidence that the Commissioners themselves ever review this process. *See* Reply.Br.45–48.

Third, the order that Respondents cite is not even from the quarterly contribution factor at issue in this case—it is from nearly a year later. It therefore provides no evidence that the FCC satisfied its review obligations here. *See Sierra Club*, 502 F.2d at 59.

Fourth, an agency cannot delegate legislative or executive powers to a private entity and then attempt to avoid nondelegation challenges by pointing to the agency's self-imposed discretion to rein in the private company on the back end. *See, e.g., Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001); TechFreedom.Br.15–17.

Respectfully,

/s/ R. TRENT McCOTTER

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CERTIFICATE OF COMPLIANCE

I hereby certify that this letter complies with the type-volume limitations of Federal Rule of Appellate Procedure 28(j) because it contains 272 words. This brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure Rule 32(a)(5)–(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook and 14-point font.

Dated: June 29, 2023

/s/ R. Trent McCotter
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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing document with the Clerk of this Court by using the CM/ECF system, which will serve all parties automatically.

Dated: June 29, 2023

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